Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-189

GERTRUDE BRINKMAN GOSS, ET AL,
Petitioners,

versus

ROBERT WINSTON G. ZUCKSWERT,
Respondent.

ORIGINAL BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES N. WOOTEN, LTD.
(A Professional Law
Corporation)
P. O. Box 3325
Lafayette, Louisiana 70501
Attorney for Respondent

SCOFIELDS' QUALITY PRINTERS P O BOX 53096 N O LA 70153 504 822 1611

INDEX

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING PETITION 5

CERTIFICATE OF SERVICE 13

APPENDIX F 1a

CASE CITATIONS

Herb v. Pitcarin, 324 U.S. 117, 65 S. Ct. 459, L. Ed. 789 7

Honeyman v. Hanan, 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350 6

Kennebec & Portland R.R.Y. Co. v. Portland & Kennebec R.R.Y. Co., 81 U.S. 23, 20 L. Ed. 850 9

Klaxton v. Stentor Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 9

Kuchenig v. The California Co., (1969) 410 F.2d 222 10

Louis v. Powell, 178 So.2d 769 11

Mellon v. O'Neal, 275 U.S. 212, 72 L. Ed. 245, 48 S. Ct. 62 6

Missouri Pacific Railroad Co. v. Hanna, 266 U.S. 184, 69 L. Ed. 235, 45 S. Ct. 36 6

Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-189

GERTRUDE BRINKMAN GOSS, ET AL,
Petitioners,

versus

ROBERT WINSTON G. ZUCKSWERT,
Respondent.

ORIGINAL BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The statement of the case as presented by petitioners seeking a writ for certiorari to the Third Circuit Court of Appeals of the State of Louisiana contains certain statements and conclusions which are mostly argumentative and respondent feels compelled to furnish the Court with an accurate statement of the case identifying the issues of fact and law which were before the Third Circuit Court of Appeals for the State of Louisiana.

STATEMENT OF THE CASE

Winston D. Goss died on January 30, 1973 leaving a last will and testament which disposed of all of the

property of his estate to various legatees, being his wife by a second marriage, certain living brothers and sisters, as well as certain nieces. The decedent was first married to Mildred Fabricius on or about May 26, 1928. The marriage took place in California where the decedent had become a resident. Mildred Fabricius, who was quite young at the time of the marriage, filed a suit against the decedent for a divorce on the grounds of cruel treatment during the year 1930 and an interlocutory judgment of divorce was granted by the California Court on October 31, 1930. In the same proceeding, a final decree of divorce was entered by the Court on November 25, 1931. A child was born to Mildred Fabricius on August 24, 1932 and the birth certificate which was introduced into evidence indicates the father of the child to be the decedent, Winston D. Goss. The undisputed facts indicate that at the time the respondent, Robert G. Zuckswert was born to Mildred Fabricius, the decedent, Winston Goss, had already moved from California, returning to the home of his parents in Acadia Parish, Louisiana. The decedent, some years thereafter, married Gertrude Brinkman, the present executrix of his estate, and a principal legatee under his will. Mildred Fabricius, sometime after the birth of her son, Robert, married David Zuckswert and raised her son to manhood with the instilled belief that his father was her husband, Mr. Zuckswert. The mother of the present respondent even filed an action under California to have the name of her son changed from Goss to Zuckswert when he was only fifteen years old and without his knowledge. It was only when he had returned from service in the United States Navy that the true facts of his birth were told to him by his mother.

It was further undisputed that the decedent did not seek out his first wife or see her following their separation in February of 1932, nor did he ever contribute to the support of the child born to her, and up to the time of his death, although he had knowledge of the birth of the respondent, he did not file any formal action with any Court seeking to disavow the child.

The disputed facts involved in this litigation surround the length and point of time when the decedent and the respondent's mother lived together as man and wife and their final separation. The respondent contends and offered in evidence the depositions of four witnesses having personal knowledge thereof; that his mother and the decedent continued to live together as man and wife until approximately February of 1932, at which time they became finally separated, never to see each other again. The petitioners contended that the decedent and his first wife were separated in September of 1930 and did not thereafter see each other or cohabit as man and wife and that since respondent was born 693 days after the interlocutory judgment of divorce, they conclude that he is not the legitimate child of the decedent. In support of this position, and subject to a timely objection entered by respondent's counsel in the Trial Court, the petitioners offered and introduced into evidence a written affidavit of the decedent executed on the same day of his last will and testament, namely December 4, 1970, to the effect that he had knowledge of the birth of plaintiff to his first wife on August 24, 1932, but that he had been separated from her since the year 1930 and he was not the father of this child. The affidavit, as well as his last will and testament, was then locked in his bank box and not disclosed until after his death.

The petitioners further introduced a barrage of witnesses, most of whom did not know Mr. Winston Goss earlier than 1938 and had no independent knowledge of any of the facts and circumstances surrounding his first marriage or the birth of the respondent. The testimony of these witnesses was aimed only at establishing the good character and reputation of the decedent in the community where he lived after he left California, even though the issue of his character and reputation was not raised by the respondent.

The respondent brought this action to be recognized as the sole legitimate descendant of the decedent, Winston D. Goss, and as such entitled to inherit one-third (1/3) of the testator's estate as his forced portion under Louisiana Law. The Trial Court found for the respondent, applying California Law to resolve the question that respondent was the legitimate son of the decedent, Winston Goss. The Trial Court further found that the presumption afforded legitimate children under the laws of the State of California was not in conflict with the positive law and public policy of Louisiana relating to legitimacy of children. Lastly, the Trial Court found that the Law of Louisiana should be applied relative to the inheritance of the decedent's estate, since Louisiana was the place where the decedent resided and died. The Court of Appeals for the Third Circuit of the State of Louisiana found no manifest error in this conclusion and went further by reviewing the evidence presented in the Trial Court, summarizing that the testimony preponderates to the effect that cohabitation between Mildred and Winston Goss took place not only after the California interlocutory decree, but also following the final divorce, and that plaintiff was conceived before the final divorce was signed. The Court concluded from those facts both Louisiana Law and California Law would give respondent a presumption of legitimacy. (See Petitioners' Appendix B 14 a).

The Court of Appeals further found that the petitioners had failed in the Trial Court to rebutt the presumptions of legitimacy with any of the evidence offered by them and the Supreme Court of the State of Louisiana denied writs.

For the first time, during this entire litigation, the petitioners have now raised a question of the application of the California and Louisiana Law as applied by the Louisiana Courts being violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, as well as being unjust under the privileges and immunities clause of Article 4, Section 2 of the United States Constitution. The respondent urges this Honorable Court to deny the petition for the various reasons set forth hereinbelow.

REASONS FOR DENYING THE PETITION

(1) The Petition For A Writ Of Certiorari Should Be Denied Because A Federal Question Was Never Raised In Any Proceeding At The State Level.

At no time during the proceedings in either the trial on the merits or during the appellate procedure, by

way of motion, pleadings, objections, or even written arguments, did the petitioners present to the Courts of the State of Louisiana any of the Constitutional questions that they have asserted in their petition for a writ of certiorari. Questions which were not raised or discussed in the State Courts cannot be urged in the Supreme Court. *Mellon v. O'Neal*, 275 U.S. 212, 72 L.Ed. 245, 48 S. Ct. 62. Before the Supreme Court of the United States may review the decision of the State Court, it must appear affirmatively from the record, not only that the Federal question was presented to the highest Court of the State having jurisdiction, but that its decision of the federal question was necessary for a determination of the case. *Honeyman v. Hanan*, 300 U.S. 14, 81 L.Ed. 476, 57 S. Ct. 350. Therefore, as stated in *Missouri Pacific Railroad Company v. Hanna*, 266 U.S. 184, 69 L.Ed. 235, 45 S. Ct. 36, a writ of certiorari would be dismissed where the record failed to disclose that the complaining party definitely raised a federal question in the State Court.

The petitioners asserted in their petition that the facts giving rise to the problems were emphasized in briefs submitted to the District Court, the Third Circuit Court of Appeals for the State of Louisiana and the Louisiana Supreme Court. The portion of petitioners' briefs appear at Appendix E, Pages 20a-21a and the arguments contained therein refer to conflicts of laws rather than a federal question involving a denial of due process and equal protection of the laws.

(2) Alternatively, Should This Court Find That The Arguments Presented By Petitioners In Briefs Before The State Courts Sufficiently And Definitively Raised The Constitutional Questions Asserted In The Petition For Writ Of Certiorari At The State Level, The Supreme Court Of The United States Still Lacks Jurisdiction Because The Case Below Was Decided Solely On Sufficient And Substantial State Grounds.

A principle which the Supreme Court of the United States has adhered to since the time of its foundation is that it will not review judgments of State Courts that rest on adequate and independent State grounds and its power of reviewing State judgments is only to correct them to the extent they incorrectly adjudge federal rights. *Herb v. Pitcarin*, 324 U.S. 117, 65 S. Ct. 459, 89 L.Ed. 789. Even if the case contains a federal question, if there is an adequate State ground that supports the decision of the Supreme Court, this Court will not review the case. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429. The Court of Appeals of Louisiana clearly stated the issues in this case to be as follows:

(1) Is the plaintiff the legitimate son of the decedent, Winston D. Goss?

(2) What inheritance rights does the plaintiff have as the legitimate son of the deceased?

The above issues are clearly determined by State Law. Both questions were answered by the Court of

Appeals and its decision rested entirely upon State Law. As to the question of status, the Courts applied the well established "conflict of law" principle, that the status of a child, as to legitimacy, is to be determined by reference to the law of the State or County where he was born. The Court of Appeals of Louisiana, after thoroughly reviewing the California Law, and assuring itself that application of the California Law would not violate any laws of Louisiana, correctly applied California Law to the status of the child and determined that he was in fact the legitimate child of the decedent.

Should the Court have decided otherwise, then we would be left with a situation where a child's status as to legitimacy or illegitimacy might change as his parents move their residency from one state to another during their entire lifetime. Clearly the Court was correct in its application of California Law, the place where the decedent was married to respondent's mother and divorced from her and the place where the respondent was born, to determine his status as a legitimate child of the decedent.

Once the child's legitimacy was determined, the second issue was easy. Louisiana's rules of conflict of laws or that succession to immovable property is determined by the law of the situs of the land and succession to movable property is transferred in conformity with the law of the decedent's domicile. Since all of the immovable property was within the State of Louisiana, and since the decedent died in the State of Louisiana, the succession laws of Louisiana applied to both the movables and immovables. Since the Court

had already determined that the child was legitimate, under the laws of forced heirship of the State of Louisiana, the Court correctly decided that the child was entitled to receive one-third (1/3) of all his father's property, and the last will and testament of the decedent, which impinged upon this legitimate child's forced portion, must be reduced accordingly.

The State of Louisiana is free to determine for itself whether a given issue is to be governed by the law of the forum or by the law of another state. *Klaxton v. Stentor Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477. It therefore follows that the conflicts of laws is not a federal question but a state issue.

The case before the various state courts in Louisiana presented no federal issue, and consequently, "the Supreme Court has no jurisdiction to review decisions based on non-federal grounds." *Kennebec & Portland R.R.Y. Co. v. Portland & Kennebec R.R.Y. Co.*, 81 U.S. 23, 20 L.Ed. 850.

(3) The Decision Of The Third Circuit Court Of Appeals For The State Of Louisiana Is The Only Decision Which Could Be Reached To Guarantee The Parties Due Process And Equal Protection Of The Laws Provided In The United States Constitution.

Much has been said in the petition for writ of certiorari about the Louisiana Courts mismatching the laws of California and Louisiana to invoke a doctrine of forced heirship. The fact that the respondent's residency was used to determine his status and not his

inheritance rights is certainly consistent with the principles of due process. Indeed the decision of the Court below is in keeping with a principle affirmed by the Fifth Circuit Court of Appeals in *Kuchenig v. The California Co.* (1969) 410 F.2d 222, which considered the use of foreign created status for purposes of Louisiana Succession Law, and in affirming this application of law, held clearly that Louisiana recognizes foreign legitimation for purposes of Louisiana Succession Law unless this foreign created status would violate the State's public policy. It is certainly clear that Louisiana's public policy favors legitimation of children and the presumptions of paternity and legitimation established by our Code are presumptions of the strongest nature and consistent with those presumptions established under the laws of the State of California.

The Court of Appeals for the Third Circuit of the State of Louisiana used the respondent's residency as a criteria for classifying his status which is clearly consistent with the constitutional guaranties of due process. If his status could be changed by the mere fact that his parents moved to another state long after his birth, then clearly there would be a violation of his constitutional rights of due process and equal protection of the laws. These circumstances are not present in the instant case.

(4) The Guaranty In The United States Constitution That The Citizens Of Each State Shall Be Entitled To The Privileges And Immunities Of Citizens In The Several States Only Requires That The State Classification Based On Residency Must Have Some Rational Relationship To A Legitimate State Purpose.

In this instance, the Courts of Louisiana lean heavily toward legitimation of children born to parents. As stated in *Louis v. Powell*, 178 So.2d 769:

> "The policy so established has for its purpose the protection of innocent children born during marriage against scandalous attacks upon their paternity, inter alia, by the husband of the mother who may be seeking to avoid his obligation, or by others unscrupulously claiming the estate of the husband after death."

The State Court in that case upheld legal objections to the admissability of testimony of the mother that she never cohabited with her husband after the separation, and the birth certificate disclosing that another was the father of the child conceived, before entry of a judgment of separation, and the Court held:

> "The principle is well established in our jurisprudence that a child born during marriage cannot be bastardized by the simple declaration of the mother as to legitimacy."

In the instant case, the respondent's status was determined by the laws of the place where he was born. This status gives him certain property rights in his ancestors' estates established under Louisiana Law when the property is situated in Louisiana and the decedent is domiciled in Louisiana at the time of death. To deny him this property right based upon the changing residency of his father would be a denial of due process to him. All of the issues involved in this case were decided upon Louisiana Law after thorough review and separate findings of fact by the Third Circuit Court of Appeals. The factual and legal issues were thoroughly argued orally as well as in briefs submitted to the Court below and at that time no federal question was ever contained in any of the arguments. Excerpts from the arguments presented below are contained in respondent's appendix F-1a through F-41a.

Respectfully submitted,

CHARLES N. WOOTEN, LTD.
(A Professional Law
Corporation)
P. O. Box 3325
Lafayette, La. 70501

Charles N. Wooten

ATTORNEY FOR RESPONDENT

CERTIFICATE

I, Charles N. Wooten, a member of the Bar of this Honorable Court do hereby certify that a copy of the foregoing brief and appendix has been served upon petitioners by mailing a copy thereof to their Attorney of Record, Lawrence G. Pugh, Jr., Pugh, Buatt, Landry & Pugh, P. O. Box 367, Crowley, Louisiana 70526 on this ____ day of August, 1975.

Charles N. Wooten

APPENDIX F

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
DOCKET NO. 4778

SUCCESSION
OF
WINSTON D. GOSS

EXCERPTS OF ARGUMENTS CONTAINED IN ORIGINAL BRIEF ON BEHALF OF ROBERT WINSTON GOSS ZUCKSWERT, PLAINTIFF-APPELLEE

ARGUMENTS

(1) THE PROPONDERANCE OF THE EVIDENCE IN THIS CASE INDICATES THAT THE APPELLEE'S MOTHER, MILDRED FABRICIUS, AND THE DECEDENT, WINSTON D. GOSS, DID IN FACT LIVE TOGETHER AND COHABIT AS MAN AND WIFE FOLLOWING, AND IN SPITE OF, AN INTERLOCUTORY DECREE OF DIVORCE GRANTED IN CALIFORNIA ON OCTOBER 31, 1930, AND CONTINUED TO LIVE TOGETHER AT THE HOME OF MILDRED FABRICIUS' PARENTS UNTIL APPROXIMATELY FEBRUARY, 1932, AND THAT DURING THIS TIME OF COHABITATION THE APPELLEE WAS CONCEIVED AND SUBSEQUENTLY BORN ON AUGUST 24, 1932.

The appellee, in support of his position, first called his mother, Mildred Fabricius, as a witness in his

behalf, who testified by deposition stating that the marriage between she and the decedent was not a happy one for her and that she and the decedent became separated in August or September of 1930 and that she sought the advice of an attorney, Mr. Horne, now deceased, to file for and obtain a divorce in her behalf. A reading of the original petition for divorce filed in the Superior Court for the County of Contra Costa, California shows that the grounds alleged by Mildred Fabricius was that of cruel treatment on the part of the decedent, Winston Goss. An interlocutory decree of divorce was entered by that Court on October 31, 1930.

After that time the appellee's mother testified that she and the decedent would see each other frequently, either at his apartment on Sixteenth Street in Richmond, California or at other places. She further testified that she and the decedent made efforts at a reconciliation and that the decedent did in fact move in with her when she was living at the main home of her parents some time in October of 1931 and continued to live with her until the first part of February, 1932. The appellee's mother described the place where she and Winston Goss first lived prior to their separation as a little cottage located in the backyard or rear of her parents main home. She further stated that after she obtained the interlocutory decree of divorce that she moved into her parents main home and vacated the cottage located to the rear thereof. She further testified that after the efforts at reconciliation had failed and the decedent left her mother's home in February of 1932, that she then returned to her attorney's office to "pick up her papers" and was handed a final decree of divorce which had been entered by the same Court

granting the interlocutory decree, which final divorce was dated November 25, 1931. She emphatically stated that this was the only time she had gone back to her attorney's office and denied signing any purported affidavit to obtain the final decree of divorce which was exhibited to her by defense counsel. She verified that at the time she went to "pick up her papers" she was then pregnant and had informed the decedent of her pregnancy.

The brief filed on behalf of the appellants attempts to discredit Mrs. Zuckswert's testimony with the statement that she testified that she and Mr. Goss did not live together after the final divorce was rendered on November 25, 1931 and that this assertion could not be reconciled with her testimony that they were together through the early part of 1932. It is submitted that appellants' counsel is incorrect in his arguments relating to the testimony of Mrs. Zuckswert. A careful reading of the entire transcript of her testimony by deposition will show that her statement was to the effect that she went to her attorney's office in August or September of 1930 to file the initial action of divorce and did not return to his office until February of 1932 whereupon she picked up her papers, referring to the final decree of divorce, on the same day which had already been entered by the Court on November 25, 1931 without further appearance by her. The Court's attention is respectfully called to the following pertinent excerpts from Mrs. Zuckswert's deposition verifying these facts:

Deposition — Transcript page 162:

"Q. Now, when was your son Robert born?
A. 1932.

Q. Do you remember his birthday?
A. August 24.
Q. Where was he born?
A. In Oakland, California.
Q. Now, at that time, Mrs. Zuckswert, were you married?
A. Well, I was married and back together with Mr. Goss and divorced, but I hadn't picked up any papers."

Deposition — Transcript page 163:

"Q. Mrs. Zuckswert, what brought about the separation, could you tell us?
A. Well, we just didn't get along, and he was very mean. He would always hit me, knock me down and argue over trivial things, even over a dog I had, and then I would go back to my folks. Of course, they lived in the same yard and I would go there for a day or so and finally he would come over and say, 'Come on back', but these were maybe only a day or so at a time.
Q. Did you discuss your marital problems with your parents?
A. Well, they lived in the same yard. They could see the black and blue marks and pinch marks on me when I would go home crying."

On *Page 165 of the transcript of the deposition*, Mrs. Zuckswert explained the decedent's feelings about the divorce as follows:

"Q. Did you tell him you were going to get a divorce?
A. Yes he knew that.
Q. And what did he do?
A. Well he didn't seem to think much of it. He would laugh about it. He didn't believe I would, I guess, and then after I had started it, then he came and wanted me to go back, tried to talk me into going back with him, forgetting about it. He always said, 'It is nothing but a piece of paper.' That is the one thing he said. 'It doesn't mean a thing.' "

On transcript *page 166* of her deposition, Mrs. Zuckswert describes where they lived following the interlocutory decree of divorce as follows:

"Q. And where did you live when you went back together?
A. He came to my folks where I was living because I moved out of the little house in the back, so he came back there and stayed with us in the same house."

Again on Transcript Page 167 of the deposition, Mrs. Zuckswert testified:

"Q. When did you go back together?
A. Oh, it was around his birthday in October, the first part, as far as I can remember, and I remember him talking about it being a birthday present. This is why it stands out in my mind, October 1 or 2. That was 1931. It was the first or second.
Q. How long did you stay together?
A. Well, we were together over the holidays there at my folks and it was either the last of January or the first part of February and he blew up and said he was going back home to Louisiana."

In response to questions concerning the final decree on *Page 177* of the Transcript, Mrs. Zuckswert answered as follows:

"A. I didn't get it until it was well past a year because we were back together again. I didn't go and try to get the papers until he left and I thought my folks would have it all to pay over again. That is the way I explained to the attorney and he said it would be all right. He would get them for me."

On the same page of the transcript, Mrs. Zuckswert was asked to recall the affidavit in support of the final decree and she stated on *Page 178* of the Transcript as follows:

"A. No I never said anything like that.
Q. I am going to show you this affidavit. It is

just a certified copy of what purports to be an affidavit signed by you and ask you if that's your signature.
A. Well, if it is, I might have signed papers, but I didn't sign anything that said that."

At this point it is interesting to note that the affidavit in the record (Transcript Page 122) shows a date of "November ____, 1931". The blank was never filled in by the notary and it could be easily assumed that in that time the attorney prepared all of the documents necessary to go through to a final divorce when he filed the initial proceedings and had the plaintiff sign them long prior to their use at the trial. Mr. Horne, the attorney who handled the matter, is no longer alive to be able to tell us how this occurred, however it is submitted that the plaintiff's testimony concerning the reconciliation and dates of she and the decedent cohabiting together as man and wife is the real relevant factor in this case and this testimony stands uncontradicted except for the decedent's affidavit which was signed on the same day of his last will and testament and will be discussed hereafter.

Mrs. Zuckswert still talked about the date upon which she and the decedent finally separated and refers to the point of time when she picked up her papers from her attorney. When questioned by defense counsel about this time, she stated as follows: (Transcript Page 181)

"Q. That you had completely become disassociated from Mr. Goss by the time you got your final divorce on November 25?
A. When I picked up the papers.

Q. Yes maam.
A. Yes, and I finally went up to the lawyer but I don't remember even the date of that.
Q. But you are satisfied that you and Mr. Goss had become separated permanently prior to the time you got your final divorce?
A. Well I don't remember when I picked them up but the year should have been up in November but we were still together through January of 1932 and the first part of February, 1932."

Again on *Page 182* of the Transcript defense counsel repeated the same question in another fashion:

"Q. Let me ask you the question another way. After you got your final divorce you did not live with Mr. Goss again did you?
A. Well I can't remember when I picked up the papers . . . that's the whole thing. I know it should have been in November when the year was up, the last part of November, but we were still together in December and January of 1932. I didn't pick up those papers."

The timing of Mrs. Zuckswert's visit to her lawyer's office was again clarified on *Page 183* of the transcript as follows:

"Q. Now again, Mrs. Zuckswert, at page 10 of your original deposition the question was put to you and I quote:

'Now, as I understand your testimony, sometime after this final blowup that you had with Mr. Goss you went to your lawyer's office to have him get the final for you, is that correct?
"A. Yes."
A. I don't remember that, but he got them for me, gave them to me, rather."

Again on *Page 184* of the Transcript in asking for a clarification of the date it was stated:

"It was sometime after the final blowup in January or February?
A. Somewhere in there.
Q. That you had the final papers picked up?
A. That's right."

Defense counsel went further and inquired about whether Mrs. Zuckswert had ever had sexual relations with any other person and on *Page 184* of the Transcript the answer was emphatic:

"All right. Did you have sexual relations after you had your lawyer pick up the final?
A. No, No."

It is evident from reading the entire transcript in this case that Mrs. Zuckswert has told the truth about the matters involving the divorce between she and the decedent. She instigated the suit in September of 1930 and obtained a preliminary decree on October 31, of 1930. Following that time she and Mr. Goss attempted

to reconcile, mostly by his insistence, which of course the law favors, and she continued to live with him overnight in the same room in her mother's home from October, 1931 until the i rst part of February, 1932. She had sexual relations w th no one other than the decedent. She had not gone back to her attorney's office until she and the decedent had a final argument and separated in February of 1932 and then she went to her attorney to "pick up her papers". The papers she refers to throughout her entire testimony is the final decree of divorce which was handed to her on the same day she appeared in her attorney's office. Her explanation of the meeting with her attorney appears at Transcript *Page 194* of her deposition as follows:

"Q Now, as I understand your testimony, some time after this final blowup that you had with Mr. Goss you went to the lawyers office to have him get the final for you, is that correct?

A. Yes.

Q. Now, would you just explain to me what you did when you went to his office? Did you see the lawyer or the secretary?

A. I saw Mr. Horner and I told him that I asked him if I could pick up the papers. My folks would have had to pay for everything again which they already had paid and then they were going to support me and my baby, take care of everything. My father wanted nothing to do with him anymore so he had the paper there and gave it to me, my final papers. Otherwise I would have to go and file over again, he

said, but I explained it all to him and I don't know now why he gave it to me but he did.

Q. Did he give it to you while you were in his office or did you have to sign a paper and then go to Court?

A. No, he gave it to me in his office."

The brief on behalf of the appellants attempts to further discredit Mrs. Zuckswert with inuendos about the reasons for her first marrying the decedent, Mr. Goss, at the age of 16, was because she thought she was pregnant. The defendants would have this Court associate some disbelief of her overall testimony since they apparently feel she has some sinister or bad moral character in concluding that in 1928, America had very few 16 year old girls who married for that reason. The Court will recall that Mr. Goss was in his mid twenties and much older than Mrs. Zuckswert when they first met and of course his motive in marrying Mildred under these conditions can only be assumed as a deep sense of responsibility for her pregnancy. The testimony further reflects that once the decedent learned of the pregnancy of plaintiff's mother during the periods of reconciliation, he actively solicited and participated in overt acts in efforts to abort the pregnancy. It is also noted that throughout his second marriage, although no medical explanation was given or known, the decedent's second wife did not give birth to any children of their marriage.

In pretrial motions, the appellants obtained blood tests of both the appellee and his mother, Mildred Fabricius, in the apparent effort to prove, if possible,

that the blood types when compared with the blood type of the decedent, would prove that plaintiff could not be the son of Mr. Winston Goss. The blood types involved and stipulated by the parties were as follows:

Mildred Fabricius	Type A Positive
Winston Goss	Type A Positive
Robert G. Zuckswert	Type O Positive

The pathologist and expert in this case called by the appellant testified unequivocally that Robert Zuckswert's blood type was consistent with that of Mildred Fabricius and Winston Goss and as a matter of fact experiments have shown that the probabilities of his blood type appearing to parents having A positive blood was one out of four times. (See transcript page 424)

Further testimony in the case was received by deposition from Mrs. Virginia Catambay. (Transcript Page 216 et seq.) Mrs. Catambay testified that she had married one of Mildred's brothers and that after Mildred and Winston Goss first separated and Mildred moved out of the little cottage, that she and her husband moved into the same and lived there for several years. She specifically recalls the time when the decedent and Mildred attempted to reconcile and the decedent lived with Mildred in the main house of Mildred's parents. She associates the birth of the plaintiff with the birth of her first daughter and recalls she and Mildred were pregnant during the same period of time.

The appellants brief again would have the Court conclude that Mrs. Catambay stated that Mildred and

Winston were separated when she and her husband moved into the little cottage, and that they were finally separated in October of 1930. This is not the testimony of the witness. The Court's attention is respectfully called to the deposition of Mrs. Catambay on Page 219 of the Transcript which reads as follows:

"Q. Now, at the time when you moved in, were Mildred and her husband, Winston, separated?
A. They were separated, yes.
Q. They had lived in that same house before?
A. They had lived in the same house before and then we moved in there when they moved out.
Q. Did you know that they were separated at that time?
A. You see, I was just married five months when really I knew all of them, and I knew she had married. I hadn't met Winston then, but I knew she had been married and had lived in the little house and I knew his name, and then, of course, he came back. I met him, you know, around October, you know.
Q. October of when?
A. 1931, and that is really about when I knew him, from October through the holidays and first of the year of 1932.
Q. When you say he came back, where did he come back to?
A. Well, he came back and lived in the front house there, in front of this little cottage at 1049.

Q. Was that where Mildred's parents lived?
A. That is where they lived.
Q. To your knowledge, during the time he was there in October, did he and Mildred live together as man and wife?
A. Oh yes, he lived there with her parents.
Q. How long did he stay with Mildred during that time?
A. Well, I know he was there over the holidays after the first of the year.
Q. Do you remember when Mildred became pregnant for Robert?
A. Yes, she became pregnant.
We were pregnant at the same time because Bobby is four months younger than my daughter. My daughter was born April 27, 1932. Bobby was born August, four months later."

Again on *Page 224* of the Transcript the following statements were made:

"Q. The question was, after the final divorce, do you think they went back together after they were finally divorced?
A. No, they went back in October, I know that, and I don't think at that time the divorce was final. He left around January and they never went back together after that at all."

It is respectfully submitted that the testimony of Mrs. Catambay further verifies the testimony of Mrs. Zuckswert that she and the decedent lived together at

the time appellant was conceived and at that time the final divorce had not yet been entered by the Court.

Another witness called on behalf of the plaintiff was Mrs. Dora Combes who recalls specifically that at the time she and her husband left California on December 15, 1931, Mildred and Winston were living together as man and wife. (Transcript Page 228) This particular witness knew Mr. Goss from early childhood and at a time when they both lived here in Louisiana. She also had occasion to see him frequently in California and of course associates the timing of her recollection with the birth of her children. This witness also recalls coming back to Louisiana in 1938, at which time she saw the decedent who made several inquiries about the plaintiff. She stated unequivocally that he inquired about his son and whether or not the child looked like him.

Appellants would attempt to discredit Mrs. Combes with the statement that she cannot be believed because she stated when she saw Mrs. Zuckswert in December of 1931 that she appeared to Mrs. Combes to be pregnant for the child that would not come until August 24, 1932. The specific testimony at *page 234* of the transcript indicates clearly she was talking about a suspicion she had at the time.

"Q. At the time did you know that Mildred was pregnant?
A. I suspected it and told my husband, and he said, you are just so positive, and I said yes she looks it.
Q. She hadn't discussed it.

A. No she had never told me. Nobody had told me but I just decided for myself, and the next I heard she was."

It is inconceivable to your writer that a suspicion of pregnancy on the part of Mrs. Combes could be used as the basis for an attack upon her credibility. She has simply stated this was an observation and conclusion of her own and did not make any statement to the effect that she had other knowledge of the facts or that Mrs. Zuckswert had told her she was pregnant. Her testimony relating to facts she did have direct knowledge about as stated above is implicit, and that is that at the time she and her husband left California on December 15, 1931, the decedent and plaintiff's mother were living together as man and wife.

The next witness called on behalf of plaintiff was Mrs. Gladys Bygum, plaintiff's aunt and younger sister of his mother. (Transcript Page 202) She testified that she recalled Mildred and Winston seeing each other quite often after the interlocutory decree of divorce was entered in October of 1930 and that she would frequently accompany her sister to the decedent's apartment and would be sent to a show while the decedent and Mildred visited together. The appellants again attempt to discredit Mrs. Bygum by making the conclusion that she was only 12 years old at the time and it is doubtful that she would possess the knowledge to know whether or not plaintiff's mother and the decedent were actually having sexual relations after the interlocutory decree of divorce. The Court is again respectfully referred to the actual testimony of this witness appearing on *Page 205* of the Transcript as follows:

"Q. Mrs. Bygum, at this point I am referring to now, the original interlocutory decree of divorce obtained by your sister in the latter part of 1930. You have just talked about Mr. Goss moving back into your parents' home the latter part of 1931. Now between the latter part of 1930 and the latter part of 1931 do you of your own knowledge have any other recollection of your sister and Mr. Winston Goss cohabiting together as man and wife?

A. All I know is that after she started the divorce he called her up and wanted to see her, and her and I went in the car and we stopped in the apartment quite often, you know. He wanted her to come up there and see him. He didn't want at that time to come down to the house, and he would ask us to go to his room, and of course, I was young, but I knew the way he acted in the room there and then he would say to my sister, 'Tell Lucille to go to the show' and they would want me to go to the show. He would take me to the show or tell me to go down and sit in the car while they were up in the room, and I was young enough, you know, and I was old enough that I knew."

The appellee further introduced as one of his exhibits, the original birth certificate issued by the Bureau of Vital Statistics for the State of California showing his birth on August 24, 1932 in Oakland, California and naming Winston D. Goss as the father of the plaintiff. At the time of his birth, the final divorce had

been entered by the Superior Court in and for the County of Contra Costa, State of California, 274 days earlier, namely November 25, 1931.

The only evidence offered by the appellants to rebutt the testimony and exhibits was an affidavit of the decedent signed on December 4, 1970 which stated that he and his first wife had no marital relations after their initial separation in the latter part of 1930. The affidavit of the decedent was introduced subject to the objection of appellee's counsel that the affidavit was not in the form of a dying declaration and did not present any exception to the hearsay rule and further that its contents were irrelevant since statements of either of the parents about their cohabitation was not sufficient evidence to overcome the presumptions of legitimacy established by law. Appellants rely upon the case of *Wall vs. Murrell*, 280 So2d 865 (1973) as establishing the basis for the introduction of the affidavit. The cited case was a suit by the sole heir of a decedent against a niece of the decedent to recover the unpaid balance of a loan made by the decedent to the defendants. The defendants were able to introduce a statement made by the decedent at the time the loan was made to the effect that if either the decedent or the defendants died before the loan had been paid the debt should be considered extinguished. The underlying equitable reasons allowing this type of evidence surrounding the making of the loan transaction is clear and the Court cited various cases in support thereof stating:

> "Although testimony respecting declarations of a person since deceased, even when against

> interest, is the weakest sort of evidence, nevertheless, such statements are legal evidence against his executor, administrator, heirs or other persons claiming under him."

In the instant case, even if the testator were alive and the issue of the paternity of the appellee were the subject of litigation, the testator's declaration to the effect that he did not have sexual relations with the mother of the appellee, who was then still his legal wife, would not be sufficient or admissible to overcome the strong presumption established in our jurisprudence. See *Lewis vs. Powell*, 178 So2d 769 where the Court held:

> "The policy so established has for its purpose the protection of innocent children born during marriage against scandalous attacks upon their paternity, inter alia, by the husband of the mother who may be seeking to avoid his obligations, or by others unscrupulously claiming the estate of the husband after death."

The Court in that case upheld legal objections to the admissibility of the testimony of the mother that she had never cohabited with her husband after their separation, and the birth certificate disclosing that another was the father of the child conceived, before entry of a judgment of separation, and the Court held:

> "The principle is well established in our jurisprudence that a child born during marriage cannot be bastardized by the simple declaration of its mother as to legitimacy."

The Court cited *Succession of Flynn*, 161 La. 707, 109 So 395; *Ezidore v. Cureau's Heirs*, 113 La. 839, 37 So 773; *Elio v. Mader*, 1 Rob. 581; *Trahan v. Trahan*, 142 So2d 571.

Furthermore, in the instant case, it is obvious that the decedent had a motive for making the affidavit on December 4, 1970. It was made simultaneously with the making of his last will and testament, and of course in order to give effect to his last will and testament and perpetuate after death the falsehood he had created for over 40 years, it must be established that he had no legitimate heir. In such cases our Louisiana Courts have held that the declaration of a decedent coupled with a motive is not good evidence. In *Succession of Anderson*, 176 La. 66, 145 So. 270, the Supreme Court considered the admissibility of a statement by a decedent made when there was a motive to misrepresent facts concerning the illigitimacy of a daughter and held the same to be inadmissible. In that case, documentary evidence of the marriage between the decedent and his first wife, the mother of the daughter seeking to annul the decedent's will, was lacking. Some time prior to his death, the decedent began living with a concubine and his daughter wrote him a note criticizing his activities. This infuriated the decedent and he wrote his daughter a letter telling her that he intended to marry his concubine in a few days and that some day he would give her, his daughter, her own history. He also said, among other things, that the mother of his daughter was such a woman as she had characterized his concubine to be. The Court excluded the letter from evidence stating that it appeared upon its face to be filled with such motives as to make such

statements concerning pedigree inadmissible, although they are only indirect statements. The universal legatee under the will of Mr. Anderson was his concubine.

After reviewing all the evidence presented in this case, it seems clear that the answer to the factual issue posed is that the appellee's mother, Mildred Fabricius, and the decedent, Mr. Winston Goss, did most certainly live together as man and wife after the interlocutory decree of divorce had been entered and prior to the final decree of divorce which terminated the marriage, and that plaintiff was conceived during this time of cohabitation.

(2) THE LAW OF THE STATE WHERE A CHILD IS BORN WILL DETERMINE HIS STATUS AND PATERNITY FOR INHERITANCE PURPOSES SO LONG AS THE SAME DOES NOT VIOLATE PUBLIC POLICY OF THE STATE WHERE THE SUCCESSION PROCEEDING IS PENDING.

In the instant case, the decedent was married to Mildred Fabricius in the State of California where they established a marital domicile. The parties were divorced in a State Court proceeding in California and a final decree of divorce was entered on November 25, 1931. Some time thereafter, the decedent left California and came to Louisiana where he established his residence in Acadia Parish and subsequently married one of the appellants in the instant case, namely Gertrude Brinkman Goss. Within 300 days from the date of the final decree of divorce, namely August 24, 1932, a child was born to Mildred Fabricius, the former

wife of the decedent and appellee in these proceedings. The law of the State of California concerning legitimacy of children is well defined in two sections of the California Code of Evidence, copies of which were introduced at the trial in this proceeding, (Exhibit P-4, Transcript *134 through 157*) and the Trial Court was requested to take judicial notice thereof, as follows:

Section 621, Legitimacy:

> "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."

Section 661:

> "A child of a woman who is or has been married, born during the marriage and within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code, or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof."

The California Courts have repeatedly held that the dissolution of marriage only occurs once a final decree of divorce has been rendered. See *Louis v. Louis*, 7 C.A. 3rd 851; 86 Cal. Rptr. 834, wherein the Court held:

> "It has been consistently held in this State that the entry of an interlocutory decree of divorce does not dissolve a marriage. Such a decree does no more than establish a right to a final decree at a later date."

See also *Olson v. Superior Court*, 175 Cal. 250, 252, 165 P. 706; *Estate of Smith*, 241 Cal. App. 2nd 205, 209; *Brown v. Brown* 177 Cal. App. 2nd 387, 388; *Green v. Green*, 66 Cal. App. 2nd 50, 57, 151 P. 2nd 679.

The appellants in brief attempt to persuade this Court that the law of California is in conflict and against the public policy of the law of the State of Louisiana and therefore the same should not be held applicable. In support of their position, the appellants cite *Succession of Fisher*, 235 La. 263, 103 So2d 276 stating that it holds that a non-resident may not inherit under the laws of Louisiana where his status to inherit was bestowed on him by the laws of another state or foreign government and the granting of the status is in conflict with the positive law and public policy of Louisiana. A review of that case shows that the decedent left a last will naming the First Church of Christ, Scientist, of Boston Massachusetts, an unincorporated association, as a beneficiary. The brothers of the decedent attempted to show that this religious order had no capacity to appear in Louisiana Courts in its own rights and that since the religious order ministered to the decedent's religion and attended the decedent during her last illness, that Civil Code Article 1489 would prohibit a legacy to it. The Supreme Court in this case recognized the status of the religious order as created under the laws of the State of

Massachusetts and indeed did hold that it had proper capacity under said laws to be the recipient of a legacy in its own name. The Court also held that charitable bequests of this nature were not repugnant to the laws of Louisiana and upheld the legacy as declared by the testator. It is respectfully submitted that the cited case does not aid the appellants' position but in fact stands for the very proposition argued and instituted on behalf of appellee in this instance.

The appellants then cite the Court Article 179 dealing with legitimate children which refers to legitimate children being those born during a marriage. This argument completely overlooks Article 184 of our Civil Code which establishes the same public policy toward a presumption of legitimacy resulting from marriage as does the law in California. Article 184 reads as follows:

> "The law considers the husband of the mother as the father of all children conceived during the marriage."

The Articles of our Civil Code make other presumptions of legitimacy as follows:

> "Article 186:
> The child capable of living which is born before 180 days after the marriage is not presumed to be the child of the husband. Every child born alive more than six months after conception is presumed to be capable of living."

> "Article 187:
> The same rule applys with respect to the child born 300 days after the dissolution of the marriage, or after the sentence of the separation from bed and board."

California law does not have a separation decree although the interlocutory decree has some of the civil aspects of a Louisiana judgment of separation from bed and board. The entire text of the two cases cited by the appellants, namely *Estate of Teel*, 34 C. 2nd 349, 210 P. 2nd 1 and *Decker v. Occidental Life Ins. Co.*, 70 C. 2nd 842, 462 P. 2nd 686 merely discuss the civil rights toward separation of community property after the entry of an interlocutory decree but in no way do these cases equate an interlocutory decree of divorce as a dissolution of the marriage. The Articles of the California Code of Evidence cited by Appellee make it clear that the time period for the presumption of legitimacy to attach to all children born following the dissolution of the marriage begins to run only from the date of such dissolution. It makes no reference to separation of the spouses and it cannot be said in any way to be against the public policy of our Louisiana Law or repugnant to it. In *Kaufman v. Kaufman*, (1962) 146 So.2d 199, the Court considered the question of the presumption afforded a child born more than 300 days after the date of a judgment of separation and held:

> "It is always presumed that parties have obeyed the sentence of separation and therefore it would be presumed that a child born more than 300 days after entry of a judgment of separation was not a child of the hus-

band, unless it was proved that there had been cohabitation between husband and wife after the separation decree."

In the instant case, as stated in the first argument hereinabove, cohabitation between appellee's mother and the decedent was fully established and even if we read into the California Law that the interlocutory judgment of divorce was equivalent to that of a judgment of separation, still there would be no legal reason under the declared public policy of Louisiana law to disregard the presumption established in plaintiff's behalf. Judge Minor Wisdom of the Fifth Circuit Court of Appeals in *Kuchenig v. The California Co.*, (1969) 410 Fed. 2nd 222 in considering the problem, stated the same as follows:

"As further indication where the foreign created 'status' for purposes of Louisiana succession law may violate public policy of Louisiana, we look to an analogous situation: Louisiana recognizes foreign legitimation for purposes of Louisiana succession law unless this foreign created status would violate the State's public policy. Scott v. Key, 1856 11 La. Ann. 232."

It certainly is clear that Louisiana's public policy favors legitimation of children and the presumptions of paternity and legitimation established by our Code are presumptions of the strongest nature which will not be lightly overturned in spite of facts presented. See *Feazel v. Feazel*, (1952) 62 So2d 119, *Succession of Barlow*, (1967) 197 So2d 682; *Lewis v. Powell*, (1965) 178 So2d 769; *George v Bertrand*, (1968) 217 So2d 47.

It is respectfully submitted that the law of the State of California should and does control as the law to be applied concerning the status of the appellee in this case, being the legitimate child of the husband of the mother, namely the decedent, Winston D. Goss.

(3) ONCE COHABITATION BETWEEN HUSBAND AND WIFE IS ESTABLISHED FOLLOWING EITHER A JUDGMENT OF SEPARATION FROM BED AND BOARD UNDER LOUISIANA LAW OR AN INTERLOCUTORY JUDGMENT OF DIVORCE UNDER CALIFORNIA LAW, A PRESUMPTION ARISES THAT ALL CHILDREN BORN WITHIN 300 DAYS OF THE FINAL JUDGMENT OF DIVORCE ARE PRESUMED TO BE LEGITIMATE CHILDREN OF THE MARRIAGE. UNDER LOUISIANA LAW, IF THE HUSBAND INTENDS TO REFUTE THE PRESUMPTION, HE MUST DO SO BY A FORMAL ACTION OF DISAVOWAL.

Our Louisiana Courts have held that the general statutory intent of the statutes providing grounds for disavowal of children is to protect helpless children born during a marriage or shortly after a marriage is dissolved, from illegitimation by one or both of their parents or by others for their own selfish aims. See *Tannehill v. Tannehill*, 226 So2d 185 Cert. Den., 254 La. 930, 228 So2d 485. Article 191 relates to the time limit for a husband to disavow a child as follows:

"In all cases above enumerated, where the presumption of paternity ceases, the husband of the mother, if he intends to dispute the legitimacy of the child, must do it within six

> months from the birth of the child, if he be in the parish where the child is born, or within six months after his return if he be absent at the time, or within six months after the discovery of the fraud, if the birth of the child was concealed from him; or he shall be barred from making any objection to the legitimacy of such child."

In the instant case, if we disregard all of the testimony of the appellee's witnesses and merely look to the affidavit of the decedent signed on December 4, 1970, one fact stands out, and that is that he knew of the birth of the plaintiff to his first wife much longer than six months before he died. He took no action to disavow the child and indeed under the above cited Article he would have no cause of action six months after he learned of the birth of the child. To permit the legatees in this instance to contest the legitimacy of plaintiff's status would defeat the entire intent and public policy of Louisiana Law. In such a case Article 192 of the Civil Code reads as follows:

> "If the husband dies without having made such objection, but before the expiration of time directed by law, six months shall be granted to the heirs to contest the legitimacy of the child, to be counted from the time when the child has taken possession of the estate of the husband or when the heirs have been disturbed by the child in their possession thereof."

In the instant case, the decedent died long after the time prescribed for him to bring an action to disavow

the child and yet his legatees now attempt to raise such questions. If we look to the law of the State of California relating to the same type of question, we can see that the action to rebutt the presumption of legitimacy may only be taken by the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. None of the legatees in this will fall into the category of persons entitled to question appellee's legitimacy. From the above it appears clear that the legal effect of cohabitation between appellee's mother and the decedent under California law, while they were married, entitles appellee to the benefit of the strongest presumption available and that is under Section 621 of the Code of Evidence he is *conclusively* presumed to be legitimate.

The California law in this instance is almost identical to the law of Louisiana as declared by the Supreme Court in *McNeely v. McNeely*, 47 La. Ann. 1321, 17 So 928, where a child was born 315 days after the judgment of separation between the parties and the husband failed to bring an action to disavow paternity. The defendant in that case was the universal legatee under decedent's will and argued that the presumption was not applicable since the child was not born within 300 days from the date of separation. The Court held:

> "This presumption of that paternity of the child of the wife born since the separation from bed and board is not conclusive; the husband is permitted to dispute it by suit. But if the paternity of the child is not thus disavowed

> by the husband, the presumption that the husband is the father becomes absolute, and the legitimacy of the child is placed beyond question."

The law seems rather clear in the instant case that once Mr. Goss failed to bring any action to disavow the paternity of the appellee, the legitimacy of the appellee as an heir of Mr. Goss was placed beyond question.

(4) THE LAW OF THE STATE OF LOUISIANA, BEING THE LAST DOMICILE OF THE DECEDENT AND THE PLACE WHERE HIS PROPERTY WAS LOCATED, WILL CONTROL THE DISPOSITION OF HIS ESTATE.

The undisputed facts in this case indicate that some time in the Spring of 1932 the decedent left the State of California and came back to Louisiana where he returned to the home of his parents. He established his domicile in Acadia Parish, Louisiana and subsequently married the present executrix of his estate, Gertrude Brinkman Goss. The property which the decedent acquired, both prior to his second marriage and during his second marriage, is all located within the State of Louisiana. The decedent also inherited property in Acadia Parish, Louisiana from his parents upon their deaths. Clearly he had a right to dispose of this property by donation either inter vivos or mortis causa. The only restrictions on such donations is contained in Article 1493 of our Civil Code which reads as follows:

> "Donations inter vivos or mortis causa cannot exceed 2/3rds of the property of the disposor, if he leaves, at his decease, a legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number . . ."

In the event a donation is made which exceeds the above portions, it must be reduced to allow the legitimate child his forced portion of the estate. Article 1502 of our Civil Code discusses the reduction of excessive donations as follows:

> "Any disposal of property, whether inter vivos or mortis causa, exceeding the quantum of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reduceable to that quantum."

Article 1504 of our Civil Code reads as follows:

> "On the death of the donor or testator, the reduction of the donation, whether inter vivos or mortis cause, can be sued for only by the forced heir, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it."

The appellants would attempt in brief to have this Court look to the laws of the State of California which they assert would not allow forced heirship. It is respectfully submitted that only Louisiana Law can control the disposition of the decedent's estate in this

instance and consequently the cited California provision is totally inapplicable. It might also be mentioned at this point that your writer, as attorney for appellee, was not given timely prior notice that the defendants would request the Court to take judicial notice of the California Probate Code or any of its provisions, which of course, under our Louisiana Code of Procedure is a pre-requisite to the introduction of a copy of such statute into the record. It is your writer's opinion that this Court, even if the statute were applicable, could not take judicial notice of the same since appellants' counsel has not followed proper Louisiana procedure.

(5) THE APPELLEE IS NOT ESTOPPED FROM NOW ASSERTING HIS RIGHTS AS A FORCED HEIR TO HIS FATHER'S ESTATE, AND IN FACT HAS TAKEN THE PROPER ACTION TO ENFORCE SUCH RIGHTS JUDICIALLY.

The appellee brings this action under Article 2931 of the Louisiana Code of Civil Procedure which reads as follows:

> "A probated testament may be annuled only by a direct action brought in the succession proceeding against the legatees, a residuary heir, if any, and the executor, if he has not been discharged. The defendants shall be cited, and the action shall be tried as an ordinary proceeding."

The appellants argue that since the appellee learned from his mother about the decedent being his father

some time about 1952 when he got out of the Navy and he made no effort to contact his father nor demand any support from him, that he is now estopped to assert his forced portion of his father's estate. All of the evidence in this case tends to substantiate the testimony of the appellee that he did not find out the name of his true father until he was a grown man and discharged from the United States Navy. Why should the appellee be motivated to seek out a man who abandoned his mother prior to appellee's birth and who, during his entire lifetime, never attempted to contact appellee, acknowledge or help him in the true sense of a father-son relationship. Never did the appellee even get so much as a Christmas card or well wishes on a birthday from Mr. Goss. The appellee testified that his reaction when he found out the name of his true father was to the effect that he could care less because the only father he had ever known was Mr. Zuckswert. The appellee was not called upon under any law of any state to seek out his father, demand support or otherwise, and in fact, after he was a grown man, he could earn his own livlihood and did not need the support of either of his parents. The appellants in brief would have this Court believe that the appellee's non-concern and non-action led them to their prejudice to believe that he would not assert his forced portion of his father's estate. Equitable estoppel does not arise from non-action but on the contrary requires acts, representations or admissions intentionally, or through culpable negligence, to induce another to believe that certain facts exist, and the other person rightfully relies on the acts and upon such belief, and will be prejudiced if the actor is permitted to deny the existence of such facts. The cases cited by defendants in support of their position are totally inapplicable.

The first case cited by appellants is *Travelers Insurance Co. vs. U.S. Fidelity & Guaranty Co.*, 168 So2d 439 which involved an action by one insurance company against another for reimbursement of workman's coverage where the insuror of a subcontractor was estopped to deny workman's compensation coverage since it had issued a certificate of insurance as required by contract between the principal contractor and the sub-contractor. Here the insuror, which was held under the doctrine of estoppel, committed an overt act in issuing the certificate of insurance which certificate was relied upon by the general contractor's insuror to their prejudice. The next case cited by appellants was *American Bank & Trust Co. v. Trinity Universal Insurance Co.*, 194 So2d 164 which involved an action by a Bank against an obligor under a Miller Act bond for the balance due on certain promissory notes made by a contractor and the funds used by the contractor to pay for labor and materials. The Bank claimed that the insuror knew the funds were being used to pay labor and material and therefore should be estopped from denying its liability. The Court held in favor of the insurance company stating that the doctrine of estoppel applys only when the misrepresentations are to matters of fact and not when they are to propositions of law. Since there was no equitable subrogation to the Bank, the insurance company was not liable.

The last cited case by the appellants and possibly the most inapplicable of all cases is that of *Allen v. Paggi Bros. Oil Co.*, 244 So2d 116, writ refused, which case talked about the law not favoring claims of those who have long slept on their rights and who suddenly wake up at the welcome vision of an unexpected ad-

vantage and invoke the aids of the Court for relief. In that case, the question was not that of estoppel but rather that of acquisitive prescription and the Court denied the plaintiffs' attempt to reclaim title to land which had been possessed by the defendant oil company for over ten and thirty years under a deed translative of title.

In this case, the only time the appellee had any right to come forward and demand the forced portion of his father's estate was of course not until his father died. He could not, during the lifetime of his father, question transactions which may have been made by his father with certain third persons and of course the only way he would be entitled to support from his parents after he reached the age of majority under any law, would be to show a need therefor. The appellee in this case did nothing; he had no need for support and of course had no desire to contact a man who had shirked the responsibilities of parenthood. The only applicable case in point is that of *Succession of Valdez*, (1950) 44 So2d 151 where the son of a testator signed an instrument reciting that he had no interest in property standing in the name of the stepmother and second wife of the testator, however the deed reflected the property was purchased in the name of the stepmother during the marriage to the son's father. After the stepmother died, the son claimed the property belonged to the community between the married parties. The Court held that:

> "The plea of estoppel cannot be maintained where it appears that the party against whom the plea is directed was ignorant of the true

facts relating to the matter or forming the subject of the plea.

Likewise, one who acts in ignorance of his rights cannot be estopped. The doctrine of estoppel is applicable only to ignorance of matters of fact, and no acknowledgments or statements of propositions of law.

Nor can a person be estopped by his declarations, even if of a judicial character, which have neither deceived or damaged anyone."

The Court in that case did not allow the doctrine of estoppel to prejudice the rights of the son to assert the subject property was part of the community. In the instant case, the appellee has made no recitations, either judicially or otherwise, which have prejudiced the defendants. As we have seen, the only statements upon which the appellants may have relied came from the decedent himself and certainly are not imputed to the appellee. It is respectfully submitted that the doctrine of estoppel relied on by the appellants is not applicable in the instant case.

(6) THE APPELLANTS, BEING THE SECOND WIFE OF THE DECEDENT, EXECUTRIX OF HIS ESTATE, AND THE REMAINING NAMED LEGATEES UNDER HIS LAST WILL AND TESTAMENT, DO NOT HAVE ANY RIGHT TO QUESTION THE LEGITIMACY OF THE APPELLEE, EITHER UNDER LOUISIANA LAW OR CALIFORNIA LAW.

As has been shown above, Louisiana law is very explicit about the presumptions of legitimacy and requires the husband, if he intends to dispute the legitimacy of a child born to his wife within the marriage or within 300 days after it terminates, that he must bring a formal action of disavowal within six months. His failure to do so within that time completely bars his right to contest the legitimacy of his child. In the same manner, his heirs are forever barred from raising the issue if he dies after the time for filing an action to disavow has expired. It is admitted in the pleadings filed herein that the decedent never brought any action to disavow the paternity of the appellee even though he positively knew of the appellee's birth to his first wife. Under California law, none of the appellants fall into the category of persons identified as those entitled to question the presumption of legitimacy although it would seem that the decedent could have done so under California law at any time prior to his death. How now can the appellants, who have provoked a proceeding probating the decedent's will disposing of all of his property to the prejudice of his forced heir, now question the legitimacy of this child? It is respectfully submitted that the appellants are barred from raising the issue of legitimacy under the facts of this case.

In reviewing all of the evidence presented herein, and assuming for the moment that appellants can question the legitimacy of the appellee, then they have simply failed to establish their burden of proof. Article 952 of our Civil Code reads as follows:

"The incapacity of heirs is not presumed. He who alleges it must prove it."

In *Cameron v. Roland*, 23 So2d 283, quoting from the Supreme Court's opinion in *Succession of Curtis*, 161 La. 1645, 109 So 832, the Court held:

> "The presumption of legitimacy is a constant presumption and is to have weight and influence throughout the investigation, the weight of the presumption increasing with the lapse of time. The doctrine . . . is applied in every jurisdiction in this country, and is therefore clear that he who questions the legitimacy of children must prove the facts necessary to sustain his contention."

The appellants in this instance have not proved such things as remoteness of the parties, impotency of the decedent, physical impossibilities through blood typing, and the like, and in fact all of the evidence points to the opposite conclusion. The appellants would have preferred if the law provided that appellee must prove his filiation with the decedent by showing the decedent always held the appellee out to be his son. These are not the facts and of course the appellants again rely upon inapplicable law. Proof of filiation is established by the introduction of a birth certificate indicating the name of the father of the child. In this case the birth certificate showed Robert Winston Zuckswert, who was originally named Robert Fabricius, the maiden name of his mother, was born on August 24, 1932 and the name of his father to be the decedent, Winston D. Goss. His name was later changed in a judicial proceeding brought by his mother when he was only 15 years of age to conform to the last name of his mother's second husband and the man who was raising him as a son. The best evidence of the filiation of legitimate children is the register of births and it is only in the absence of such registration, either if lost or destroyed or not made at all, that it suffices for a child to show that he has been constantly considered as a child born during marriage. See *Succession of Rockwood*, 231 La. 521, 91 So2d 779, wherein the Supreme Court declared the law of Louisiana to be contained in Civil Code Article 193 reading as follows:

> "The filiation of legitimate children may be proved by a transcript from the register of birth or baptism, kept agreeably to law or to the usages of the country."

The effect to be given registrations such as that described above was considered by the Supreme Court in two other cases. In *Succession of Jacobsen*, 182 La. 151, 161 So. 185, the Court held:

> "From an examination of Article 193 et seq. of the Civil Code and the above quotation from the opinion of the Court, we can come to but one conclusion, and that is that legitimate filiation can be proved, and the best evidence to prove it is the register of births and baptisms, and that it is only in the absence of such registration, either if lost or destroyed or not made, that it suffices for the child to show that he has been constantly considered as a child born during marriage."

Again in *State ex rel Treadaway v. La. State Board of Health*, 221 La. 1048, 61 So2d 735, the Court observed:

> "As the name indicates, the records kept by the registrar are vital to the general public welfare. The registration of a birthright must be given as much sanctity under the law as the registration of a property right."

In the instant case, the Court is faced with two lines of facts. The appellants contend on the one hand that the decedent never held the appellee out to be his son and therefore there is no proof of legitimate filation. The appellee on the other hand has introduced a certified copy of his birth certificate which names the decedent as his father. Certainly, of the two types of evidence presented to the Court, the best evidence of the legitimate filation as stated by the Supreme Court is that as recorded on the birth certificate.

Since probating the will of the decedent, Mrs. Gertrude Brinkman Goss has been qualified as testamentary executrix. Appellee's status as a legitimate heir of the decedent has been denied by the appellants and the entire estate has been administered by the executrix, which consists of various income producing properties. Additionally, the executrix has petitioned and obtained an ex parte order from the Court allowing her a living allowance from the estate in the sum of $1,000.00 per month. The appellee, once his rightful place in the succession is recognized, can then turn to the more important issue involved, and that is what the forced portion of his father's estate consists of and how it can best be administered. According to the pleadings herein, there was apparently little debt owed by the decedent at the time of his death and consequently once appellee's rightful place is established

in his father's estate there should be no need for any further administration which can only burden the estate with additional expenses.

Much has been said in appellants' brief about the fact that Mr. Charles Goss, a nephew of the decedent, and the decedent, were not on good terms prior to decedent's death. The appellee admitted that he knew Mr. Charles Goss, however the appellants would associate some question about appellee's motive in now coming forth to claim his legitime. Your writer will not attempt to rebutt these arguments since the Trial Court has already ruled upon appellee's counsel's objection that such testimony was totally irrelevant. Appellants' counsel was insistent upon making up a record in spite of the Trial Court's ruling and therefore all of the testimony relating to the ill feelings between the decedent and Mr. Charles Goss was taken under a proffer. To now attempt to make argument out of this irrelevant evidence would in your writer's opinion be a useless justure.

It is respectfully submitted that because of all or any one of the above reasons cited, this Court is respectfully urged to affirm the Trial Court's decision, recognizing appellee as the sole legitimate descendant of the decedent, annuling the probated testament of the decedent insofar as it attempts to dispose of all of his estate to the prejudice of appellee's legitime.